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 CORE COMMUNICATIONS, INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

SUSAN SIMON, individual, on behalf of
 herself and all others similarly situated,

Plaintiffs,

v.

ADZILLA, INC. (NEW MEDIA), a
 Delaware Corporation; CONDUCTIVE
 CORPORATION, a Delaware Corporation;
 CONTINENTAL VISINET
 BROADBAND, INC., a Delaware
 Corporation; CORE
 COMMUNICATIONS, INC., d/b/a/
 CORETEL COMMUNICATIONS, INC., a
 Delaware Corporation; and DOES 1-50,
 Corporations Defendants,

Defendants.

Case No. C09-00879 MMC

**DEFENDANT CORE COMMUNICATIONS,
 INC.'S NOTICE OF MOTION AND
 MOTION TO DISMISS UNDER FED. R.
 CIV. P. 12(b)(2)**

Date: July 10, 2009
 Time: 9:00 a.m.
 Courtroom: 7, 19th Floor
 Judge: Hon. Maxine M. Chesney

1 TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 10, 2009, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard before the Hon. Maxine M. Chesney, United States District Judge, in
4 Courtroom 7, 19th Floor of the United States District Court for the Northern District of California,
5 San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California,
6 Defendant Core Communications, Inc. ("Core") will and hereby does move this Court for an
7 order, pursuant to Fed. R. Civ. Proc. 12(b)(2), dismissing the Complaint for lack of personal
8 jurisdiction over Core. Core's motion is based upon this notice, the following memorandum of
9 points and authorities, the accompanying declaration of Bret L. Mingo, the Complaint, and such
10 additional matters as may be judicially noticed or properly come before this Court prior to or at
11 the hearing of this matter.

12 Dated: May 29, 2009

SCHIFF HARDIN LLP

13 ARENT FOX LLP

14
15 By: /s/ Rocky N. Unruh
16 Rocky N. Unruh
17 Attorneys for Defendant
18 Core Communications, Inc.
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1 **I. INTRODUCTION**

2 The plaintiff, Susan Simon (“Simon”), is a resident of Virginia. She alleges that a device
3 developed by defendant Adzilla, Inc. (“Adzilla”), called the “Zillicaster,” was used to intercept
4 and inspect her internet communications. She claims this infringed her privacy rights in violation
5 of federal and California statutes. She purports to bring this case on behalf of herself and other
6 similarly situated internet users.

7 Defendant Core Communications, Inc. (“Core”) moves to dismiss the Complaint under
8 Fed. R. Civ. P. 12(b)(2). Core is a competitive local exchange carrier (“CLEC”) that provides
9 telecommunications services to internet service providers (“ISPs”) on the East Coast. It is
10 incorporated under the laws of the District of Columbia, and has its principal place of business in
11 Annapolis, Maryland. It operates as a CLEC in Maryland and Pennsylvania. Simply put, the
12 plaintiff has not alleged and cannot prove the type of minimum contacts with California that must
13 exist before a nonresident like Core can be sued in a court in this state.

14 **II. STATEMENT OF FACTS**

15 Core is a District of Columbia corporation headquartered in Annapolis, Maryland.
16 Declaration of Bret L. Mingo (“Mingo Decl.”) ¶ 2. Core’s business is providing
17 telecommunications services to dial-up ISPs. *Id.* ¶ 3. Core operates its CLEC business in
18 Pennsylvania and Maryland. *Ibid.* Core does not have any connection to California: it does not
19 do any business here; it is not authorized to do business here, it has no customers here; it has no
20 employees here; it does not have a registered agent here; it does not pay taxes here; it does not
21 own or lease property here; it does not advertise here; and it does not have any office, bank
22 account, mailing address or telephone listing here. *Id.* ¶¶ 4-10.

23 The plaintiff is a Virginia resident. Compl. ¶ 16. She is not a customer of Core’s because
24 Core is not an ISP and does not sell internet connection services to end-users like plaintiff.
25 Mingo Decl. ¶ 3. Instead, the plaintiff receives her dial-up internet connection services from
26 defendant Continental Visinet Broadband, Inc. (“Continental”). Compl. ¶ 16. Continental is an
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1 ISP located in Richmond, Virginia.¹ The plaintiff's purported basis for suing Core in California
2 is that Core permitted Adzilla's Zillicaster to be installed on Core's network, and the Zillicaster
3 intercepted plaintiff's internet communications and transmitted them to Adzilla's data analysis
4 center in California. Compl. ¶¶ 20, 73-83. The plaintiff alleges that Adzilla is a Delaware
5 corporation headquartered in California. *Id.* ¶18.

6 Core had a written agreement with Adzilla for a period of time, which authorized Adzilla
7 to install its equipment on Core's network. Mingo Decl. ¶ 13, Exh. A. That agreement had no
8 connection to California, however. In the agreement, signed in August of 2006, Adzilla is
9 identified as a Canadian corporation headquartered in Vancouver, British Columbia. *Ibid.* The
10 agreement stated it was to be governed by the laws of New York. *Id.* ¶ 14. The only equipment
11 Adzilla installed on Core's network pursuant to the agreement was at network POPs in
12 Philadelphia, Pennsylvania, and Ashburn, Virginia. *Id.* ¶ 15. During the installation and testing
13 of the equipment, Core employees communicated with Adzilla employees in Vancouver. *Id.* ¶ 16.
14 To Core's knowledge, its employees did not communicate with any Adzilla employees located in
15 California. *Ibid.* Adzilla's equipment never made it through the testing phase because of on-
16 going interference with Core's network, and it was deactivated in December of 2007.² *Ibid.*

17 **III. ARGUMENT**

18 **A. The Court May Not Properly Exercise Personal Jurisdiction Over Core.**

19 The plaintiffs bear the burden of making a *prima facie* showing of jurisdiction. *Rio*
20 *Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002); *see also Pena v. Valo*,
21 563 F. Supp. 742, 747 (C.D. Cal. 1983) (plaintiff failed to make a *prima facie* showing that the
22 court had jurisdiction by relying on "the conclusory allegations of his complaint" in response to
23 defendants' affidavits to the contrary). Only uncontroverted "well pled facts," not mere
24 conclusory allegations, in the complaint may be deemed true. *Harris Rutsky & Co. Ins. Services,*
25 *Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003).

26
27 ¹ Continental has also filed a Rule 12(b)(2) motion to dismiss, which is currently scheduled for hearing on
28 July 31, 2009.

² If, as the plaintiff alleges, Adzilla is now a Delaware corporation headquartered in California, Core
believes that change occurred after the Adzilla equipment on Core's network had been deactivated.

1 “Where, as here, there is no applicable federal statute governing personal jurisdiction, the
2 law of the state in which the district court sits applies.” *S.H. Silver Co. Inc. v. David Morris*
3 *Intern.*, 2008 W.L. 4058364 (N. D. Cal. 2008). California Code of Civil Procedure section
4 410.10 provides that jurisdiction can be founded “on any basis not inconsistent with the
5 Constitution of this state or of the United States.” The jurisdiction of the California courts is
6 therefore “coextensive with the outer limits of due process under the state and federal
7 constitutions, as those limits have been defined by the United States Supreme Court.” *Republic*
8 *Int’l Corp. v. Amco Engineers, Inc.*, 516 F.2d 161, 167 (9th Cir. 1975); *see also Aanstad v. Beech*
9 *Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).

10 The due process clause imposes clear limitations on the exercise of personal jurisdiction:

11 The Due Process Clause protects an individual’s liberty interest in
12 not being subject to the binding judgments of a forum with which
13 he has established no meaningful contacts, ties, or relations. By
14 requiring that individuals have fair warning that a particular activity
15 may subject [them] to the jurisdiction of a foreign sovereign, the
 Due Process Clause gives a degree of predictability to the legal
 system that allows potential defendants to structure their primary
 conduct with some assurance as to where that conduct will and will
 not render them liable to suite.

16 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). In evaluating whether the
17 exercise of personal jurisdiction is constitutionally permissible, a court must ask (1) whether the
18 defendant has sufficient “minimum contacts” with the forum and (2) whether, even with those
19 contacts, exercising personal jurisdiction over that defendant comports with “traditional notions
20 of fair play and substantial justice.” *Id.* at 476-77; *see also International Shoe Co. v. Washington*,
21 326 U.S. 310, 316 (1945).

22 A defendant may be subject to personal jurisdiction either under (1) “general” jurisdiction
23 or (2) “limited” or “specific” jurisdiction. *Fields v. Sedgwick Ass. Risks. Ltd.*, 796 F.2d 299, 301
24 (9th Cir. 1986).

25 If a defendant’s contacts with the forum state are “extensive, wide-ranging, continuous or
26 systematic,” general personal jurisdiction may be warranted for all cause of action asserted
27 against the defendant regardless of how they arise. *Peterson v. Kennedy*, 771 F.2d 1244, 1264
28 (9th Cir. 1985).

1 If the nonresident's contacts are less extensive, it may still be subject to "limited" or
2 "specific" personal jurisdiction if the litigation arises out of the defendant's activities within the
3 forum state. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Doe v. Unocal Corp.*, 248
4 F.3d 915, 923 (9th Cir. 2001).

5 The Court does not have jurisdiction over Core under either theory.

6 **1. The Court Does Not Have "General" Jurisdiction Over Core.**

7 A court may exercise "general" jurisdiction over a defendant – that is, jurisdiction in all
8 cases without regard to whether a claim is sufficiently connected to the defendant's contacts with
9 the forum state – only if the plaintiff demonstrates that the defendant's contacts with the forum
10 state are "substantial" or "continuous and systematic." *Helicopteros Nacionales de Columbia,*
11 *S.A. v. Hall*, 466 U.S. 408, 416 (1984); *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d
12 1163, 1169 (9th Cir. 2006) (citation omitted) ("in a controversy unrelated to a defendant's contacts
13 with the forum, a court may exercise general jurisdiction only where continuous corporate
14 operations within a state are thought so substantial and of such a nature as to justify suit against
15 the defendant on causes of action arising from dealings entirely distinct from those activities").

16 "The standard for establishing general jurisdiction is 'fairly high,' and requires that the
17 defendant's contacts be of the sort that approximate physical presence." *Bancroft & Masters, Inc.*
18 *v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citation omitted). Clearly, Core does
19 not satisfy this standard, and the plaintiff has not so alleged.

20 **B. The Court Does Not Have "Specific" Jurisdiction Over Core.**

21 There is a three-part test for determining whether a court may exercise specific
22 jurisdiction over a nonresident defendant:

23 "(1) The nonresident defendant must do some act or consummate
24 some transaction with the forum or perform some act by which he
25 purposefully avails himself of the privilege of conducting activities
26 in the forum, thereby invoking the [forum state's] benefits and
privileges; (2) the claim must be one which arises out of or results
from the defendant's forum-related activities; and (3) [the] exercise
of jurisdiction must be reasonable."

27 *Cybersell v. Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997). "If any of the three requirements is not
28 satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v.*

1 *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995).

2 **1. Core Has Not Purposefully Availed Itself of Any Benefits And**
3 **Privileges in California.**

4 The “purposeful availment” requirement ensures that a defendant will not be haled into a
5 jurisdiction as a result of random, fortuitous or attenuated contacts, or based on the unilateral
6 activity of another party or a third person. *Burger King*, 417 U.S. at 475. In order to show
7 purposeful availment, the plaintiff must satisfy the “effects test” articulated in *Calder v. Jones*,
8 465 U.S. 783, 789 (1984). “To meet the effects test, the defendant must have (1) committed an
9 intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt
10 of which is suffered and which the defendant knows is likely to be suffered in the forum state.”
11 *Bancroft & Masters, supra*, 223 F.3d at 1087. The effects test does not mean, however, that a
12 “foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.”
13 *Id.* Instead, “something more” is required — namely, that the defendant has “expressly aimed”
14 its wrongful conduct at the forum state, “target[ing] a plaintiff whom the defendant knows to be a
15 resident of the forum state.” *Id.* The plaintiff cannot meet these requirements.

16 First, Core has not “expressly aimed” any activity at California. Core operates as a CLEC
17 in Pennsylvania and Maryland. It entered into an agreement with a Canadian company, Adzilla.
18 Pursuant to the agreement, Adzilla installed equipment at Core’s network POPs in Pennsylvania
19 and Virginia. Even assuming, as the plaintiff alleges, that Adzilla’s equipment intercepted her
20 internet communications emanating from her residence in Virginia, and transmitted those
21 communications to Adzilla’s data analysis center in California, that activity does not amount to
22 purposeful availment by Core, because it was not Core that undertook that activity.

23 Second, nothing that Core did targeted residents in California, nor did the plaintiff suffer
24 any harm here. The plaintiff is a resident of Virginia. Any harm she suffered by an alleged
25 invasion of her privacy would have occurred where she resides, not in California. *E.g., Pearce v.*
26 *E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1499 (D.D.C. 1987) (“Clearly, an injury...can only
27 occur where the plaintiff is located at the time of the impact of the privacy invasion.”).
28

1 **2. Exercising Personal Jurisdiction over Core Also Would Be**
2 **Unreasonable.**

3 The Court is to look to seven factors in assessing the reasonableness of jurisdiction:

4 “(1) the extent of the defendant’s purposeful injection into the forum state’s affairs; (2) the burden
5 on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the
6 defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient
7 judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in
8 convenient and effective relief; and (7) the existence of an alternative forum.” *Dole Food*
9 *Company v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002). Each factor supports a finding that
10 personal jurisdiction over Core would be unreasonable here.

11 a. Purposeful injection. This Circuit recognizes that “the smaller the
12 element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable
13 is its exercise.” *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1488 (9th Cir. 1993)
14 (quotation marks omitted). As explained above, Core has taken no action to inject itself into
15 California. If any of the plaintiff’s internet communications were transmitted to California, that
16 was done by Adzilla, not Core.

17 b. Burden on the Defendants. While the factor is not dispositive, it is
18 typical for a court to “examine the burden on the defendant in light of the corresponding burden
19 on the plaintiff.” *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1998) (quotation
20 marks omitted). When it is equally difficult for the defendant to come to the plaintiff’s forum as
21 it is for the plaintiff to come to the defendant’s, this factor is neutral. Here, however, neither the
22 plaintiff nor the defendant is from California; neither side benefits from a California forum.
23 Moreover, the burden of litigating in California is substantial for Core. Because the events at
24 issue took place outside of California, all of Core’s evidence – its witnesses and records –are
25 located on the East Coast. This is an unnecessary burden given that the plaintiff also resides on
26 the East Coast, and purchased her internet connection services from a Virginia ISP.

27 c. Conflict with Other States. Given California’s minimal connection
28 to this suit, it would be inappropriate for it to serve as the forum. The plaintiffs’ claims involve

1 non-California conduct against non-Californians, and as the Supreme Court has put it, “a State
2 may not impose economic sanctions on violators of its laws with the intent of changing the
3 tortfeasors’ lawful conduct in other States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572
4 (1996). To the extent that the plaintiff’s rights are in need of vindication, that is the sole concern
5 of the jurisdictions in which she lives. *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982)
6 (recognizing that a state “has no legitimate interest in protecting nonresident shareholders”). It is
7 not for California to dictate to other states whether, and how, they should regulate the provision
8 of internet access.

9 d. California’s Interest in Adjudicating Dispute. While California
10 would have an interest “in providing a forum for its residents and citizens who are tortiously
11 injured,” *Dole Food*, 303 F.3d at 1115-16, that is of no bearing here because the plaintiff is not a
12 California resident.

13 e. Efficient Resolution. It would be not be efficient to litigate and try
14 this case in California. There are four named defendants, one named plaintiff, and presumably
15 hundreds of putative class members. At most, only one, Adzilla, is a California resident, and it
16 may not have been a resident at the time the activity complained of took place. Even a settlement
17 could be difficult to negotiate efficiently in California given the Class Action Fairness Act’s
18 requirement of a fairness hearing. 28 U.S.C. § 1712(e). Unnamed class members would be
19 required to come to California to challenge any settlement instead of being able to litigate in (or
20 closer to) their home jurisdictions.

21 f. Importance to Plaintiffs. The plaintiff has no interest in having this
22 suit heard in California because she does not reside here. It would be far more convenient for
23 plaintiff to litigate in her home forum, which is also the site of her alleged injury.

24 g. Alternative Forum. “The plaintiff bears the burden of proving the
25 unavailability of an alternative forum.” *Core-Vent, supra*, 11 F.3d at 1490. Here, the plaintiff
26 cannot prove she lacks an alternative forum in which to pursue her claims.

27 **IV. CONCLUSION**

28 The plaintiff has no basis for suing Core in California. Core is not a resident of the state,

1 does not do business here, and has not purposefully availed itself of any benefits or privileges
2 here. Under the circumstances presented, the exercise of personal jurisdiction over Core would
3 offend traditional notions of fair play and substantial justice. Core's Rule 12(b)(2) motion to
4 dismiss should be granted.

5 Respectfully submitted,

6 Dated: May 29, 2009

SCHIFF HARDIN LLP

7 ARENT FOX LLP

8
9 By: /s/ Rocky N. Unruh
10 Rocky N. Unruh
11 Attorneys for Defendant
Core Communications, Inc.

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